

UNITED STATES BANKRUPTCY COURT  
For The Northern District of California

FILED

JUL 27 2011

United States Bankruptcy Court  
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

SALEH LAJKEM and  
ROSALBA C. RAMIREZ

Debtors.

SALEH LAJKEM and  
ROSALBA C. RAMIREZ,

Plaintiffs,

vs.

JP MORGAN CHASE BANK, ET AL,

Defendants.

Case No. 10-56363-ASW

Chapter 7

Adv. Proc. No. 11-5060

MEMORANDUM DECISION ON MOTIONS PREVIOUSLY  
SET FOR HEARING ON JUNE 23, 2011

Before the Court are several matters filed by Debtors Saleh Lajkem and Rosalba C. Ramirez ("Plaintiffs") originally set for hearing on June 23, 2011. The June 23, 2011 hearing was taken off calendar to allow the Court to issue a written decision on the following matters: (1) Plaintiffs' motion for summary judgment against ACS Educational Loan Services ("ACS") (formerly known as Chase Student Loan Services) and New Mexico Student Loans (set for hearing per notice filed April 25, 2011); (2) Plaintiffs' motion to

UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 dismiss Educational Credit Management Corporation ("ECMC") from  
2 these proceedings (set for hearing per notice filed May 5, 2011);  
3 (3) Plaintiffs' notice of violation of transfer of claim between  
4 ECMC and JP Morgan Chase Bank (with American Student Assistance  
5 ("ASA") as guarantor) pursuant to Federal Rule of Bankruptcy  
6 Procedure 3001(e)(2) ("Rule 3001(e)(2)") (set for hearing per  
7 notice filed June 13, 2011); (4) Plaintiffs' motion to treat  
8 paragraphs four and fourteen of ECMC's answer to Plaintiffs' first  
9 amended complaint as affirmative (set for hearing per notice filed  
10 May 27, 2011); (5) Plaintiffs' motion to strike New Mexico  
11 Educational Assistance Foundation's (doing business as New Mexico  
12 Student Loans) motion to dismiss pursuant to Bankruptcy Local Rule  
13 9014-1 (set for hearing per notice filed June 10, 2011); and  
14 (6) Plaintiffs' motion to strike ECMC's points and authorities and  
15 accompanying declaration of Kerry Klisch pursuant to Civil Local  
16 Rule 7-3 (set for hearing per notice filed June 13, 2011).

17 Plaintiffs are proceeding in propria persona. Defendant ECMC  
18 is represented by Miriam Hiser, Esq. of the Law Offices of Miriam  
19 Hiser. Defendant New Mexico Student Loans is represented by  
20 Reginald J. Storment, Esq. The other defendants have not yet  
21 appeared in this adversary proceeding.

22 This Memorandum Decision constitutes the Court's findings of  
23 fact and conclusions of law, pursuant to Rule 7052 of the Federal  
24 Rules of Bankruptcy Procedure.

I.

FACTS

Plaintiffs filed a chapter 7 bankruptcy petition on June 18, 2010. Plaintiffs' Schedule F, filed on July 2, 2010, lists total student loan debt of \$116,185.42. ACS is listed as being owed \$58,670.42 in student loan debt. JP Morgan Chase Bank is listed as being owed \$25,129.00 in student loan debt. New Mexico Student Assistance is listed as being owed \$2,351.00 in student loan debt. Suntech Collegiate Funding is listed as being owed \$30,035.00 in student loan debt. No student loan creditor filed a claim or complaint to determine the dischargeability of Plaintiffs' student loan debt while Plaintiffs' bankruptcy case was pending. Plaintiffs received a discharge on September 21, 2010 and Plaintiffs' bankruptcy case was closed on September 22, 2010.

On February 28, 2011, Plaintiffs sent a letter to the undersigned Judge asking for declaratory judgment concerning the discharge of Plaintiffs' student loan debt in Plaintiffs' bankruptcy case. The Court treated the letter as a complaint. The letter alleged that JP Morgan Chase Bank (with ASA as guarantor) and New Mexico Student Institute of Mining and Technology were attempting to collect unpaid student loan principal balances plus interest. Plaintiffs inquired as to why Plaintiffs' student loan debt was not discharged in Plaintiffs' bankruptcy case. Plaintiffs also alleged that, because Plaintiff Saleh Lajkem was unemployed and recently diagnosed with a mental disability, the student loan debt posed an extreme financial burden to Plaintiffs' single-income family. There is no indication in the public record that this letter was served on the named defendants.

1 On March 8, 2011, Plaintiffs filed a motion for summary  
2 judgment against ACS and New Mexico Student Loans. This motion was  
3 denied at a hearing held on April 11, 2011 because Plaintiffs'  
4 letter complaint was not served properly.

5 On March 31, 2011, ECMC filed an answer to Plaintiffs' letter  
6 complaint. ECMC's answer asks the Court to: (1) dismiss  
7 Plaintiffs' complaint with prejudice; (2) declare Plaintiffs' debt  
8 to ECMC to be non-dischargeable; (3) award ECMC fees and costs in  
9 responding to Plaintiffs' complaint; and (4) any other relief the  
10 Court deems proper.

11 Also March 31, 2011, Plaintiffs filed a request for a clerk's  
12 entry of default against ACS and New Mexico Student Loans. This  
13 request was denied at the hearing on April 11, 2011 because  
14 Plaintiffs' letter complaint was not served properly.

15 On April 25, 2011, Plaintiffs filed a first amended complaint  
16 against ACS, New Mexico Student Loans, and ECMC requesting a  
17 declaratory judgment or, in the alternative, a determination of  
18 whether Plaintiffs' student loan debt is non-dischargeable under  
19 Bankruptcy Code section 523(a)(8). Plaintiffs allege that  
20 Plaintiffs' student loan debt was discharged in Plaintiffs'  
21 chapter 7 bankruptcy case and that defendants were engaged in  
22 deceptive collection tactics.

23 Also on April 25, 2011, Plaintiffs re-noticed for hearing  
24 Plaintiffs' motion for summary judgment against ACS and New Mexico  
25 Student Loans on the basis that Plaintiffs' debts to these two  
26 entities were discharged in Plaintiffs' chapter 7 bankruptcy case.

27 On May 5, 2011, Plaintiffs moved to dismiss ECMC from the  
28 proceedings on the basis that the National Student Loan Data System

UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 ("NSLDS") listed ASA as the "guarantee agency" for Plaintiffs'  
2 student loan debt, and not ECMC.

3 On May 18, 2011, ECMC filed an answer to Plaintiffs' first  
4 amended complaint ("ECMC Answer"), which alleged that ECMC is the  
5 current holder of a student loan promissory note executed by  
6 Plaintiff Saleh Lajkem of which the outstanding principal and  
7 interest balance is approximately \$64,000.00.

8 On May 27, 2011, Plaintiffs moved to treat ECMC's answers to  
9 Plaintiffs' first amended complaint in paragraphs four and fourteen  
10 as affirmative. Paragraph four of ECMC's answer admits the  
11 allegations contained in paragraphs eight, nine, and eleven of  
12 Plaintiffs' first amended complaint. Paragraph fourteen is ECMC's  
13 denial of the allegations in paragraphs fifty-seven to sixty-three  
14 of Plaintiffs' first amended complaint.

15 Also on May 27, 2011, Plaintiffs filed a notice of violation  
16 of transfer of claim by ECMC and JP Morgan Chase Bank (with ASA as  
17 guarantor) pursuant to Rule 3001(e)(2). Plaintiffs allege that,  
18 according to Rule 3001(e)(2), ECMC should have filed a proof of  
19 claim with the Clerk's Office. The Clerk would then substitute the  
20 transferee for the transferor in the claims register unless a party  
21 in interest objected.

22 On June 2, 2011, New Mexico Student Loans moved to dismiss  
23 Plaintiffs' first amended complaint as to New Mexico Student Loans  
24 on the ground that the student loan debt in which New Mexico  
25 Student Loans is alleged to have an interest is actually owed to  
26 New Mexico Institute of Mining and Technology (serviced by  
27 University Accounting Services). No declarations or other evidence  
28 were filed in support of New Mexico Student Loans' motion.

UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 On June 7, 2011, ECMC filed a memorandum of points and  
2 authorities (in opposition to Plaintiffs' motion to dismiss and  
3 Plaintiffs' motion for summary judgment) and an accompanying  
4 declaration by Kerry Klisch. ECMC asserts that ECMC is the current  
5 holder of one of the student loan promissory notes at issue in this  
6 litigation, that ECMC filed a timely answer to Plaintiffs' first  
7 amended complaint, and that ECMC's counsel provided Plaintiffs with  
8 courtesy copies of the assignment documents. ECMC also moved for  
9 summary judgment on the grounds that student loan debt creditors do  
10 not need to file proofs of claim, since Bankruptcy Code section  
11 523(a)(8) is self-executing, and Plaintiffs never established the  
12 dischargeability of Plaintiffs' student loan debt.

13 According to the declaration by Kerry Klisch: (1) the debt in  
14 which ECMC claims an interest was originally held by BONY Mellon  
15 ELT CFS LN TRUSTS/CHASE and originally guaranteed by ASA; (2) when  
16 Plaintiffs filed for bankruptcy, the original lender transferred  
17 all right, title, and interest in the note to ASA, which in turn  
18 transferred the note to ECMC; (3) JP Morgan Chase Bank does not  
19 hold any title, right, or interest to the note; and (4) ECMC is the  
20 only party which can represent ECMC's interests adequately. ECMC  
21 attached a copy of the assignment of claim from ASA to ECMC to  
22 ECMC's motion.

23 Also on June 7, 2011, Plaintiffs filed a request for clerk's  
24 entry of default against ACS, JP Morgan Chase Bank, and New Mexico  
25 Institute of Mining and Technology. All three requests were denied  
26 by the Clerk's Office on June 8, 2011 because Plaintiffs did not  
27 file a Form B260, and because Plaintiffs did not serve the  
28 complaint to the name of an individual identified by title as

1 required by Federal Rule of Bankruptcy Procedure 7004(b)(3) for a  
2 corporate or partnership defendant.

3 On June 9, 2011, Plaintiffs filed a motion to strike New  
4 Mexico Student Loans' motion to dismiss on the grounds that New  
5 Mexico Student Loans violated Civil Local Rule 9014-1 because New  
6 Mexico Student Loans' motion was not accompanied by any  
7 declarations or a memorandum of law supporting New Mexico Student  
8 Loans' position and because New Mexico Student Loans "does not  
9 declare or stipulate its position." Plaintiffs also filed a motion  
10 to strike ECMC's points and authorities in opposition to  
11 Plaintiffs' motion to dismiss ECMC as well as the accompanying  
12 declaration of Kerry Klisch pursuant to Civil Local Rule 7-3.

13  
14 II.

15 ANALYSIS

16 **A. Plaintiffs' Motion for Summary Judgment**

17 Plaintiffs move for summary judgment against ACS and New  
18 Mexico Student Loans on the basis that Plaintiffs' debts to these  
19 two entities were discharged in Plaintiffs' chapter 7 bankruptcy  
20 case. ECMC opposes the motion. As discussed in Section II.B.,  
21 below, ECMC is the real party in interest.

22 Summary judgment is appropriate where the evidence  
23 demonstrates that there are no genuine issues of material fact for  
24 trial and the moving party is entitled to judgment as a matter of  
25 law. Barboza v. New Form, Inc., 545 F.3d 702, 707 (9th Cir. 2008).  
26 Here, Plaintiffs are not entitled to judgment as a matter of law.

27 The Supreme Court has stated that Bankruptcy Code section  
28 523(a)(8) is "self-executing" and that "[u]nless the debtor

1 affirmatively secures a hardship determination, the discharge order  
2 will not include a student loan debt." Tennessee Student  
3 Assistance Corp. v. Hood, 541 U.S. 440 (2004). In other words,  
4 creditors to whom Plaintiffs owe student loan debt are not required  
5 to file a proof of claim or to litigate the dischargeability of any  
6 such debt during the bankruptcy case. Any assignees of Plaintiffs'  
7 student loan debt would also be exempted from filing claims,  
8 whether the assignment took place during or after the close of  
9 Plaintiffs' bankruptcy case.

10 Thus, contrary to Plaintiffs' assertions, Plaintiffs' student  
11 loan debt remains due and nondischargeable despite the fact that  
12 none of Plaintiffs' student loan creditors filed a proof of claim  
13 in this bankruptcy case or a complaint to determine  
14 dischargability.

15 **B. Plaintiffs' Motion to Dismiss ECMC from these Proceedings**

16 Plaintiffs move to dismiss ECMC as a party from these  
17 proceedings. ECMC opposes Plaintiffs' motion to dismiss. As  
18 discussed in more detail in Section II.F., below, Plaintiffs'  
19 motion to strike ECMC's opposition and accompanying declaration is  
20 denied.

21 Plaintiffs assert that, according to the NSLDS, the current  
22 guarantee agency for Plaintiffs' student loan debt is ASA -- not  
23 ECMC. However, ECMC has submitted a declaration explaining how the  
24 note to which ASA once held right, title, and interest was  
25 transferred in right, title, and interest to ECMC on April 13,  
26 2011. ECMC also submitted a copy of the assignment of claim letter  
27 to the Court. Based on this uncontroverted evidence, the Court  
28



1 finds that ECMC is the current party in interest regarding the note  
2 for Plaintiffs' student loan debt.

3 Federal Rule of Civil Procedure 19(a), as incorporated by  
4 Federal Rule of Bankruptcy Procedure 7019, provides in relevant  
5 part:

6 (a) (1) A person ... must be joined as a party if:

7 . . .  
8 (B) that person claims an interest relating to the  
9 subject of the action and is so situated that  
10 disposing of the action in the person's absence  
11 may:

12 (i) as a practical matter impair or  
13 impede the person's ability to  
14 protect the interest.

15 ECMC has submitted evidence that ECMC is the assignee of some of  
16 Plaintiffs' student loan debt. Because the other parties have no  
17 financial incentive to represent ECMC adequately in this  
18 proceeding, ECMC must be a party to Plaintiffs' dischargeability  
19 adversary proceeding. In other words, because this proceeding  
20 involves property in which ECMC has an interest, ECMC must be a  
21 party in order to represent ECMC's financial interest adequately.

22 **C. Plaintiffs' Notice of Violation of Transfer of Claim**

23 Plaintiffs assert that the transfer of claim from ASA to ECMC  
24 was improper under Rule 3001(e) (2). However, Rule 3001(e) (2)  
25 governs the transfer of claims other than for security after a  
26 proof of claim has been filed. Because Bankruptcy Code section  
27 523(a) (8) is self-executing, ASA was never required to file a proof  
28 of claim. Rule 3001(e) (2) cannot, therefore, govern the transfer  
of claim from ASA to ECMC.

1           **D.     Plaintiffs' Motion re ECMC's Answer**

2           Plaintiffs move to treat ECMC's answer to Plaintiffs' first  
3 amended complaint at paragraphs four and fourteen as affirmative.  
4 The Court is unclear as to what relief Plaintiffs seek. ECMC's  
5 answer at paragraph four states, "ECMC admits the allegations at  
6 paragraphs eight, nine and eleven." ECMC Answer, 1:27. As ECMC's  
7 answer at paragraph four already admits allegations made by  
8 Plaintiffs in Plaintiffs' first amended complaint, there is no need  
9 for Plaintiffs to move to treat ECMC's answer as affirmative.

10          ECMC's answer at paragraph fourteen states, "ECMC denies the  
11 allegations at paragraphs fifty-seven to sixty-three." ECMC  
12 Answer, 2:19. Paragraphs fifty-seven to sixty-three of Plaintiffs'  
13 first amended complaint refer to Plaintiffs' allegations relating  
14 to Plaintiffs' request for declaratory relief against defendants.  
15 These allegations assert that Plaintiffs' student loan debt was  
16 discharged in Plaintiffs' bankruptcy case and that the defendants  
17 are not entitled to collect on that debt. The proper way to  
18 dispute ECMC's denial of Plaintiffs' allegations is through  
19 settlement or adjudication, not a motion to treat ECMC's denial as  
20 affirmative. Plaintiffs' motion to treat ECMC's answer at  
21 paragraphs four and fourteen as affirmative is therefore denied.

22           **E.     Plaintiffs' Motion to Strike re New Mexico Student Loans**

23          Plaintiffs move to strike New Mexico Student Loans' motion to  
24 dismiss pursuant to Bankruptcy Local Rule 9014-1. Plaintiffs  
25 contend that New Mexico Student Loans did not submit any  
26 declarations in support of New Mexico Student Loans' motion and  
27 this Court should therefore strike New Mexico Student Loans' motion  
28

1 to dismiss. Plaintiffs' motion to strike is denied for two  
2 reasons.

3 First, a motion to strike is granted only in limited  
4 circumstances. Federal Rule of Civil Procedure 12(f) provides that  
5 a court may "strike from a pleading an insufficient defense or any  
6 redundant, immaterial, impertinent, or scandalous matter."  
7 Fed. R. Civ. P. 12(f). The purpose of a Rule 12(f) motion to  
8 strike is to avoid the expenditure of time and money that arises  
9 from litigating spurious issues by dispensing of those issues  
10 before trial. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527  
11 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994).  
12 Motions to strike are generally disfavored. Rosales v. Citibank,  
13 133 F.Supp.2d 1177, 1180 (N.D. Cal. 2001). In most cases, a motion  
14 to strike should not be granted unless "the matter to be stricken  
15 clearly could have no possible bearing on the subject of the  
16 litigation." Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F.Supp.2d  
17 1048, 1057 (N.D. Cal. 2004).

18 Here, Plaintiffs move to strike New Mexico Student Loans'  
19 motion to dismiss merely because no declarations were filed with  
20 the motion. The grounds Plaintiffs assert in Plaintiffs' motion to  
21 strike may be raised as opposition to New Mexico Student Loans'  
22 motion to dismiss and are not a basis upon which to strike that  
23 pleading.

24 Second, Bankruptcy Local Rule 7007-1, not Bankruptcy Local  
25 Rule 9014-1, governs the filing of motions in an adversary  
26 proceedings and Bankruptcy Local Rule 7007-1 does not require that  
27 declarations be filed in support of a motion. Accordingly, the  
28 Court denies Plaintiffs' motion to strike.

1           **F.     Plaintiffs' Motion to Strike re ECMC**

2           Plaintiffs move to strike ECMC's memorandum of points and  
3 authorities in opposition to Plaintiffs' motion to dismiss and  
4 motion for summary judgment, as well as the accompanying  
5 declaration of Kerry Klisch, pursuant to Civil Local Rule 7-3 which  
6 provides that any opposition must be filed at least 21 days before  
7 the hearing. While Bankruptcy Local Rule 1001-2 incorporates  
8 certain Bankruptcy Local Rules, Civil Local Rule 7-3 is not one of  
9 those rules.

10           Instead, Bankruptcy Local Rule 7007-1 governs the time to file  
11 papers related to a motion in an adversary proceeding. Rule 7007-1  
12 provides in relevant part that "[a]ny opposition to a motion shall  
13 be filed and served at least 14 days before the hearing date."  
14 B.L.R. 7007-1(b). Here, ECMC filed ECMC's memorandum, declaration,  
15 and accompanying items on June 7, 2011, more than 14 days before  
16 the scheduled hearing for this matter on June 23, 2011, and so  
17 ECMC's opposition papers were filed timely. Accordingly, the Court  
18 denies Plaintiffs' motion to strike ECMC's memorandum of points and  
19 authorities in opposition to Plaintiffs' motion to dismiss and  
20 motion for summary judgment pursuant to Civil Local Rule 7-3.

21           **G.     Discharge of Plaintiffs' Student Loan Debts For Hardship**  
22           **Reasons**

23           While Plaintiffs make numerous allegations in Plaintiffs'  
24 first amended complaint, the first amended complaint does not  
25 specifically seek to have Plaintiffs' student loan debts discharged  
26 for hardship reasons. "Section 523(a)(8) is the 'hardship'  
27 provision, which allows the court to discharge an otherwise  
28 nondischargeable student loan if excepting the debt from discharge

UNITED STATES BANKRUPTCY COURT  
For The Northern District of California

1 will impose an undue hardship on the debtor or the debtor's  
2 dependants." 4 Collier on Bankruptcy, ¶523.14[2] at 523-103 to  
3 523-104 (16th ed. 2011). In order to except student loan debt from  
4 discharge, the bankruptcy court must determine that the payments of  
5 the debt will cause an undue hardship on the debtor and the  
6 debtor's dependants, thus defeating the "fresh start" concept of  
7 the bankruptcy laws. There may well be circumstances that justify  
8 the failure to repay a student loan, such as illness or incapacity.  
9 If the court finds that such circumstances exist, the court may  
10 order the debt be discharged. Id. at 523-104. A court may  
11 discharge all or a portion of a student loan that meets the  
12 requirements of section 523(a)(8). In re Saxman, 325 F.3d 1168,  
13 1174 (9th Cir. 2003).

14 "There has been a wide range of judicial reaction to the undue  
15 hardship claims of debtors." 4 Collier on Bankruptcy at ¶523.14[2]  
16 at 523-104. The commonly used test for evaluating whether a  
17 student loan is dischargeable under section 523(a)(8) provides that  
18 a student loan debt is dischargeable if three conditions are met:

- 19 (1) The debtor cannot maintain -- based on current  
20 income and expenses -- a "minimal" standard of  
living if forced to repay the loans;
- 21 (2) There are indications that the state of affairs is  
22 likely to persist for a significant portion of the  
repayment period; and
- 23 (3) The debtor has made good faith efforts to repay the  
24 loans.

25 Brunner v. New York State Higher Education Servs. Corp., 831 F.2d  
26 395 (2d Cir. 1987); In re Pena, 155 F.3d 1108 (9th Cir. 1998).

27 In determining whether the debtor can maintain a "minimal"  
28 standard of living if forced to repay the loans, the court should

1 consider the debtor's income, living expenses, and standard of  
2 living. The method for calculating a debtor's average monthly  
3 expenses is a matter properly left to the discretion of the  
4 bankruptcy court. Pena, 155 F.3d at 1112. If subtracting the  
5 debtor's monthly expenses from the debtor's monthly income leaves a  
6 deficit, then the debtor cannot maintain a minimal standard of  
7 living and pay off the student loans. Pena, 155 F.3d at 1113.  
8 See also In re Mason, 464 F.3d 878, 882 (9th Cir. 2006); In re  
9 Craig, 579 F.3d 1040, 1045 (9th Cir. 2009). Other courts have also  
10 focused on whether the debtor has maximized the debtor's income and  
11 minimized the debtor's expenses. Educational Credit Management  
12 Corp. v. DeGroot, 339 B.R. 201, 207 (D. Or. 2006).

13 The second prong of the test, sometimes referred to as the  
14 "additional circumstances test," requires the debtor to show that  
15 additional circumstances exist indicating that this state of  
16 affairs is likely to persist for a significant portion of the  
17 repayment period of the student loans. Brunner, 831 F.2d at 396.  
18 Stated in the affirmative, this part of the Brunner test considers  
19 whether there is a likelihood that the debtor's financial situation  
20 will improve sufficiently to permit the debtor to repay the loans.  
21 NYS v. Educational Credit Management Corp., 308 B.R. 436, 442  
22 (9th Cir. BAP 2004). The court may consider any number of  
23 circumstances that relate to future ability to pay. Depending on  
24 the case, the debtor's age, training, physical and mental health,  
25 education, assets, ability to obtain a higher paying job or reduce  
26 expenses, and other factors not listed here may be relevant. The  
27 test is, by its nature, case-by-case. NYS, 308 B.R. at 444.

UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 The common thread of prior rulings discussing this prong of  
2 the Brunner test is that those facts generally considered  
3 "additional circumstances" are beyond the debtor's control.  
4 DeGroot, 339 B.R. at 210. Where the debtor has reasonable control  
5 over the circumstances causing hardship, courts are much more  
6 reluctant to go against Congress' general policy of not discharging  
7 student loan debt. See In re Birrane, 287 B.R. 490, 497-98, 500  
8 (9th Cir. BAP 2002) (finding second prong not met as debtor had "no  
9 problems that were insurmountable or that impaired her ability to  
10 work" and noting, "[t]he debtor may not willfully or negligently  
11 cause his own default, but rather his condition must result from  
12 factors beyond his reasonable control") (internal quotations and  
13 citation omitted); In re Chapelle, 328 B.R. 565, 571-573 (Bankr.  
14 C.D. Cal. 2005) ("[T]he evidence does not show that [the debtor's]  
15 difficulties are likely to persist, or that she is faced by  
16 'additional circumstances' that she cannot overcome or are beyond  
17 her reasonable control."); In re Oyler, 397 F.3d 382, 386 (6th Cir.  
18 2005) ("[M]ost importantly, [the circumstances] must be beyond the  
19 debtor's control, not borne of free choice.").

20 The final prong of the Brunner test requires that the debtor  
21 exhibit good faith in the debtor's efforts to repay the student  
22 loans. See Pena, 155 F.3d at 1114. Courts consider a number of  
23 factors in deciding whether the debtor has exercised good faith,  
24 including: (1) whether the debtor has worked to maximize income and  
25 minimize expenses; (2) whether the debtor has made an effort to  
26 negotiate a repayment plan; (3) whether the debtor has made any  
27 payments on the loan; and (4) the timing of the debtor's attempt to  
28 have his or her loan discharged. Birrane, 287 B.R. at 499;



1 Brunner, 831 F.2d at 397; Chapelle, 328 B.R. at 573. Courts will  
2 also consider "[A] debtor's effort - or lack thereof - to negotiate  
3 a repayment plan," although a history of making or not making  
4 payments is, by itself, not dispositive. Birrane, 287 B.R. at  
5 499-500. The debtor's obligation to act in good faith only ends  
6 when the loan has been paid in full or discharged. Thus, the  
7 debtor must continue making good faith efforts to repay even after  
8 a bankruptcy petition has been filed. Birrane, 287 B.R. at 500.

9  
10 III.

11 CONCLUSION

12 For the forgoing reasons, Plaintiffs': (1) motion for summary  
13 judgment against ACS and New Mexico Student Loans; (2) motion to  
14 dismiss ECMC from these proceedings; (3) notice of violation of  
15 transfer of claim between ECMC and JP Morgan Chase Bank (with ASA  
16 as guarantor) under Rule 3001(e)(2); (4) motion to treat paragraphs  
17 four and fourteen of ECMC's answer to Plaintiffs' first amended  
18 complaint as affirmative; (5) motion to strike New Mexico Student  
19 Loans' motion to dismiss; and (6) motion to strike ECMC's  
20 opposition and accompanying declaration of Kerry Klisch pursuant to  
21 Civil Local Rule 7-3 are all denied.

22 This Court's ruling does not preclude Plaintiffs from  
23 litigating the dischargeability of Plaintiffs' student loan debt as  
24 an undue hardship under Bankruptcy Code section 523(a)(8) in the  
25 future. Because Plaintiffs' first amended complaint does not  
26 specifically seek to have Plaintiffs' student loan debt discharged  
27 for hardship reasons, Plaintiffs will need to further amend  
28 Plaintiffs' complaint, if Plaintiffs choose to pursue this relief.



UNITED STATES BANKRUPTCY COURT  
For The Northern District Of California

1 In order to amend the first amended complaint, Federal Rule of  
2 Bankruptcy Procedure 7015 requires that Plaintiffs must either  
3 obtain the stipulation of all answering and appearing defendants **or**  
4 file, serve and set for hearing -- on notice to all defendants who  
5 have answered or otherwise appeared in this adversary proceeding at  
6 the time that the motion is filed and served -- a motion seeking  
7 the Court's permission to amend Plaintiffs' complaint further. See  
8 3 Moore's Federal Practice, §15.14[1] (3d ed. 2011).

9  
10 IT IS SO ORDERED.

11  
12 Dated:

July 27, 2011

*Arthur S. Weissbrodt*

ARTHUR S. WEISSBRODT  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
For The Northern District of California

1 Court Service List

2 Saleh Lajkem  
3 316 Mid-Valley Center #153  
4 Carmel, CA 93923

4 Rosalba C. Ramirez  
5 316 Mid-Valley Center #153  
6 Carmel, CA 93923

6 JP Morgan Chase  
7 ACS P.O. Box 22724  
8 Long Beach, CA 90801-5724

8 New Mexico Institute of Mining and Technology  
9 (University Accounting Services)  
10 P.O. Box 5291  
11 Carol Stream, IL 60197-5291

12 Educational Credit Management Corporation  
13 1 Imation Place Building 2  
14 Oakdale, MN 55128

12 Miriam E. Hiser  
13 Law Offices of Miriam E. Hiser  
14 550 Montgomery St. #650  
15 San Francisco, CA 94111

15 ACS Education Loan Services, LLC  
16 501 Bleecker Street  
17 Utica, NY 13502

17 New Mexico Student Loans  
18 UAS LLC (Servicer)  
19 7400 Tiburon LE  
20 Albuquerque, NM 87109-5910

19 Reginald J. Storment  
20 7400 Tiburon NE/POB 93970  
21 Albuquerque, NM 87199-3970

21 Office of the U.S. Trustee / SJ  
22 U.S. Federal Bldg.  
23 280 S 1st St. #268  
24 San Jose, CA 95113-3004

24

25

26

27

28